

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LINDA STEPHENS</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>RIVERSIDE HOSPITAL</b>	)	
Respondent	)	Docket No. 216,480
	)	
AND	)	
	)	
<b>PHICO INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the January 9, 2006 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on May 24, 2006.

**APPEARANCES**

Timothy A. Short, of Pittsburg, Kansas, appeared for the claimant. Scott J. Mann, of Hutchinson, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed the Award failed to list the claimant's deposition testimony<sup>1</sup> or a stipulation regarding medical records<sup>2</sup> and that they are to be considered part of the court's record. The parties also stipulated that if this claim is found compensable, neither disputes that portion of the ALJ's Award which finds a 14 percent

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<sup>1</sup> Claimant had depositions taken on October 9, 1996 and August 17, 1998.

<sup>2</sup> Stipulation in regard to medical records filed February 25, 2004.

permanent partial functional disability and the 30 percent permanent partial general (work) disability.

### **ISSUES**

The ALJ concluded claimant met with personal injury by accident on July 3, 1996, while in respondent's employ. He further found that claimant provided timely notice of her accident as required by K.S.A. 44-520. The ALJ then awarded claimant 99.57 weeks of temporary total disability benefits followed by a 30 percent work disability based upon a 35 percent task loss and a 25 percent wage loss.

Respondent argues claimant's low back complaints pre-dated the events of July 3, 1996 and that based upon the medical evidence, she failed to establish that she sustained a work-related accident that could have caused such low back complaints. Respondent also denies receiving timely notice of accident. As a result, respondent contends it is not responsible for benefits under the workers compensation act and the ALJ's Award should be reversed. In the alternative, should the Board find claimant suffered a compensable accident and injury that arose out of and in the course of claimant's employment with respondent, respondent argues that claimant was not temporarily and totally disabled from substantial gainful employment for the period alleged.

Claimant urges the Board to affirm the ALJ's Award in all respects.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a CNA working in a skilled nursing facility within respondent's hospital. In July 1996 she was assigned to 6-8 patients and tended to their daily needs. On July 3, 1996, claimant was helping a patient to the restroom when the patient began to fall. Claimant reached for the patient to keep her from falling and while doing so, the patient stepped on claimant's left foot. Sometime thereafter, claimant noticed that her left ankle and knee began swelling. Claimant recalls mentioning this event to a co-worker on the date it happened, but does not recall telling her supervisor.

The next day, July 4, 1996, claimant was working and her left leg complaints continued to increase. Claimant told a supervisor, Machele Clark, of her complaints. The testimony is conflicting about whether claimant told Machele she was simply in pain and needed treatment or whether she also disclosed her complaints and their connection to the event with the patient the day before. Ms. Clark denies claimant told her that her leg complaints were work-related on July 4, 1996. Nonetheless, both parties agree claimant left her position on that date and reported to the ER in respondent's hospital.

Based upon claimant's left leg and foot complaints, the physician in the ER suspected claimant had deep vein thrombosis (DVT). The ER records do not mention a work-related injury or a lifting incident. Rather, they refer to calf and leg pain only. Claimant was treated with medication, a doppler test was performed and she was off work for a period of time. Claimant's left leg complaints continued and eventually the DVT diagnosis was ruled out. Apparently because her complaints were ongoing and not attributable to a DVT problem, and because she mentioned lifting was a part of her job, additional diagnostic tests were performed. On July 22, 1996, an MRI to her lower back was done and claimant was advised that she had a ruptured disc at L5-S1. According to claimant, she was told to file a workers compensation claim at that time.

Claimant was then referred to and treated by Dr. John P. Estivo who recommended epidural injections, an EMG and myelogram. He also took her off work beginning August 5, 1996. Dr. Estivo's records indicate claimant was complaining of lumbar spine pain with pain and numbness radiating into the left leg. According to these records, claimant attributed these complaints to an event on "July 3, 1996 when she twisted her lumbar spine several times while helping a patient".<sup>3</sup> Dr. Estivo released claimant to return to work on August 22, 1996, but the respondent was unable to accommodate her temporary 20 pound lifting restriction. Claimant apparently never returned to work for respondent after July 8, 1996 although her preliminary hearing testimony indicates she wanted to return to work.

As of December 3, 1996 claimant was released by Dr. Robert L. Eyster with permanent restrictions of no lifting over 20 pounds and no repetitive bending or twisting over 10 times per hour.<sup>4</sup> Although claimant continued to see Dr. Eyster for follow-up visits, her restrictions did not change.

The record indicates claimant has obtained employment sporadically over the years since her accident and at times, she earned a comparable wage. But the majority of the time she has remained unemployed. The dates and times of her subsequent employments are, at best, vague.

At her lawyer's request, claimant was examined by Dr. Edward J. Prostic on June 12, 2001. According to Dr. Prostic's report, claimant indicated she was injured when she was transferring a patient who stepped on her left foot and caused her to twist her back. He confirmed the small herniation at L5-S1 and her conservative course of treatment. Dr. Prostic's report indicates that while one physician has recommended surgery, Dr. Eyster has cautioned against it.

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<sup>3</sup> P.H. Trans. (Oct. 17, 1996), Cl. Ex. 1 at 4.

<sup>4</sup> P.H. Trans. (Apr. 3, 1997), Resp. Ex. 1 at 5.

Following his examination and review of the records, Dr. Prostic testified that claimant sustained injury to her low back during the course of her employment on July 3, 1996. He assigned a 14 percent permanent partial impairment to the whole body.<sup>5</sup> Dr. Prostic also recommended claimant avoid lifting weights greater than 30 pounds occasionally or 10 pounds frequently, with all significant lifting in the mechanically optimum position of her low back. She is also to avoid frequently bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment or captive positions.<sup>6</sup> Based upon his review of a task loss analysis Dr. Prostic opined that claimant had lost the ability to perform 11 of the 35 tasks previously performed during her 15 year work period, leaving her with a 31 percent task loss.

Upon cross examination, Dr. Prostic was asked whether the records he reviewed were consistent with the history provided by the claimant. In particular, Dr. Prostic was asked whether a twisting maneuver is required to cause a disk to rupture or whether the act of a patient stepping on claimant's foot alone would cause a herniation. Dr. Prostic agreed that an injury to the foot alone would not affect a disc nor aggravate an existing condition in the low back. But that claimant had relayed to him that she twisted during the transfer and that in addition to leg pain her back later began to hurt as well. For this reason, he concluded that claimant's accident caused her symptoms and her resulting disc herniation.

Also upon cross examination Dr. Prostic confirmed he was unaware that claimant had undergone medical care for what respondent's counsel described as "low back complaints" from 1991 through May 10, 1996 with a chiropractor, Dr. Brian McDougal. Dr. Prostic then testified that even if claimant had been in treatment before July 3, 1996, he believed that it was more probably true than not that the July 3, 1996 incident aggravated her underlying disease rather than being the sole cause of the herniated disc.<sup>7</sup>

Dr. Philip Mills also examined claimant for purposes of this litigation. Dr. Mills did not see claimant until January 9, 2004. During the course of her examination claimant denied "ever seeing a chiropractor, physician, physician or osteopath for her neck or back prior to the injury."<sup>8</sup> His report suggests claimant is a vague historian as she was unable to recall all of the names of the physicians she had seen over the years. And his report indicates that he was not given any of the medical records and claimant had not completed the questionnaire or the pain inventory. Claimant did explain that she had been treated for

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<sup>5</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed.). All references are to the 4<sup>th</sup> ed. of the *Guides* unless otherwise noted.

<sup>6</sup> Prostic Depo. at 10.

<sup>7</sup> *Id.* at 16.

<sup>8</sup> Mills Depo., Ex. 2 at 1 (Jan. 9, 2004 IME).

left ankle and left knee complaints for about 3 weeks after her injury but she was then found to have injured her low back and was thereafter treated for a herniated disc.<sup>9</sup>

Following his examination of claimant, Dr. Mills diagnosed a tenderness in the right SI joint, a possible SI sprain and by history, possibly a bulging discopathy rather than a herniated disc. However, he went on to state that he has no medical records but he could not rule out the bulging discopathy.<sup>10</sup> Nonetheless, Dr. Mills opined that “to a reasonable degree of medical probability there is a causal relationship between the examinee’s current complaints and the reported work activity on 07/03/96.”<sup>11</sup>

Dr. Mills was then deposed on January 19, 2004, just weeks after his examination. During this deposition, respondent’s counsel shared some records from Dr. Charles Long’s office which, according to respondent’s counsel, reflect prior injury and treatment to claimant’s low back beginning May 13, 1996.<sup>12</sup> Dr. Mills was also presented with documents regarding phone calls made between claimant and her employer regarding her need to be off work in May 1996. Dr. Mills agrees that these documents reflect back complaints and “a history, a specific history of an accident.”<sup>13</sup> And Dr. Mills testified that claimant did not provide him with a history of back complaints in May 1996 which occurred while moving furniture.<sup>14</sup>

Dr. Mills testified that he was unable to render an opinion within a reasonable medical probability as to the relationship of the claimant’s alleged work-related back injury of July 3, 1996 and the diagnoses rendered in his January 2004 report.<sup>15</sup> He went on to testify that after reviewing the initial ER record, he found that claimant reported no specific injury to that physician. Rather, claimant apparently advised that she had left leg pain radiating up and down which began on July 3, 1996. There was no mention of a patient stepping on claimant’s foot or of a twisting maneuver.

Respondent’s counsel went on to share some additional records with Dr. Mills. According to Dr. Mills these records cover a period from July 13, 1996 to September 9, 1996 and do not reflect a reference to an injury involving a patient stepping on claimant’s

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 7-8.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.* at 9-10.

<sup>15</sup> *Id.* at 11.

left foot. Thus, he viewed them as being inconsistent with claimant's recitation of her accident when he saw her in January 2004. And again, based upon these inconsistencies, he testified that he was unable to attribute claimant's present complaints to an accident that occurred on July 3, 1996. He likewise testified that, after reviewing the MRI report (dated July 22, 1996) and his physical examination of claimant, he was unable to provide a functional rating for claimant's condition nor could he state that there was a cause and effect between claimant's alleged accident and her low back complaints.<sup>16</sup>

Claimant concedes she had been undergoing treatment with a chiropractor in the weeks and months before her July 3, 1996 accident. Beginning early May 1996 claimant sought treatment with Dr. Charles Long for muscle spasms in her neck. According to claimant, she awoke one morning with neck pain. This was at about the same time she was moving from Parsons, Kansas to Wichita, Kansas. Claimant testified that her problems were limited to her neck and that she did not report any low back problems to Dr. Long.

While experiencing these neck problems in May, claimant called in sick on a number of days. At one point she spoke to Stephanie Warner, one of respondent's employees. Ms. Warner testified that claimant called the facility on May 16, 1996 and advised she would be unable to work due to neck and back complaints. When asked how she injured herself, Ms. Warner indicated claimant told her she didn't know how she hurt herself, but that it might have been from moving. There is no indication whether these alleged back complaints were to the upper back or the lower back.

Dr. Long testified that he treated claimant over a span of 21 visits from May 13, 1996 up to July 2, 1996. While his records make certain references to her low back, it appears that the primary focus of his treatment was for the neck and mid back. However, on May 13, 1996 he examined her low back and even took x-rays. As of June 21, 1996, there is a reference to interferential therapy on claimant's low back and Dr. Long testified that his office provided a little extra therapy on her low back to "help calm it down".<sup>17</sup> On her last visit on July 2, 1996 no treatment was provided for the low back.

Dr. Long next saw claimant on September 20, 1996, over two months after her alleged accident. Again, her complaints were neck and upper back pain. When treating her he focused her treatment not only on the neck but her low back as well, including adjustments.

Dr. Long agreed that it would be fair to state that claimant complained of low back pain before July 3, 1996. He also testified that claimant's symptoms changed from her first

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<sup>16</sup> *Id.* at 17.

<sup>17</sup> Long Depo. at 14.

visit on July 2, 1996 to September 20, 1996. When he saw claimant in September she had radicular symptoms, something that was not present during his earlier course of treatment. She also had a more limited range of motion and spasms on the right in her lower back, and tested positive on a variety of tests that yielded negative results when performed back in May 1996.

The ALJ concluded claimant suffered a compensable injury on July 3, 1996 and awarded her 99.57 weeks of temporary total disability (ttd), a 14 percent permanent partial impairment to the whole body (solely for the low back injury) and a 35 percent task loss and a 25 percent wage loss. The task loss finding was based upon the uncontroverted testimony offered by Dr. Prostic while the 25 percent wage loss is the result of an imputed wage based upon a pre-injury wage of \$307.60. Although the ALJ indicated claimant was entitled to ttd benefits from July 8, 1996 to June 1, 1998, it is unclear what evidence substantiates this finding.

The first issue to be resolved is whether claimant sufficiently established that she sustained personal injury by accident at work on July 3, 1996. The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>18</sup> “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>19</sup>

The Board has considered the parties’ arguments and the entire contents of the record and concludes claimant has, by the barest of margins, established that she sustained an accidental injury on July 3, 1996 while in respondent’s employ. Claimant’s testimony as to the existence of an injury on that date was uncontroverted by any direct evidence or testimony. Moreover, the onset of her leg and foot symptoms were consistent with the occurrence she describes. The Board affirms the ALJ’s finding with respect to claimant’s personal injury by accident arising out of and the course of her employment on July 3, 1996.

The Board also affirms the ALJ’s conclusion with respect to notice. K.S.A. 44-520 provides:

**Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the

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<sup>18</sup> K.S.A. 44-501(a) (Furse 1993).

<sup>19</sup> K.S.A. 44-508(g) (Furse 1993).

employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The ALJ noted that claimant proceeded to respondent's emergency room on July 4, 1996, the day after her accident, seeking treatment. Although there is a dispute as to whether claimant mentioned her need for treatment was work related during her conversation with Ms. Clark, both parties agree respondent sent claimant to the ER. Under these facts and circumstances, the Board finds claimant's testimony credible and concludes claimant provided notice within the 10 period as required by K.S.A. 44-520. Thus, the ALJ's conclusion with respect to notice is affirmed, albeit based upon a different reason. While the ALJ concluded claimant had just cause for delay in providing notice, the Board finds claimant did give notice within the 10 day period.

The Board also agrees with the ALJ in concluding claimant met her burden with respect to her claim that her accident led to her low back complaints. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.<sup>20</sup>

In this instance, the records indicate claimant apparently voiced no low back complaints immediately after her injury. The first notation of low back complaints did not come until July 22, 1996. And the first indication of any twisting maneuver associated with the accident comes on August 1, 1996. Under these facts, the Board finds it is more likely than not that claimant twisted her back while lifting this patient in her work and the acute onset of her leg complaints delayed discovery and reporting of her low back complaints. The fact that the physicians fully explored her knee complaints and then elected to have her undergo an MRI to the low back lends some credence to her argument.

The Board is also persuaded by the testimony offered by Dr. Long who indicated claimant's physical presentation was significantly different when comparing her complaints from May to July 2, 1996 to her presentation and complaints in September, 1996. And while respondent maintains that her earlier chiropractic treatments were to her low back

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<sup>20</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).



and due to an injury that occurred while moving and well before the July 3, 1996 accident, the Board is not persuaded. It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.<sup>21</sup> The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.<sup>22</sup> The Board finds that the bulk of claimant's chiropractic treatment was to her upper back and neck. And to the extent there may have been some treatment to her low back, that condition was substantially aggravated by her subsequent injury on July 3, 1996.

Having concluded claimant's accident is compensable, pursuant to the parties' agreement the Board hereby affirms the ALJ's functional impairment finding of 14 percent to the whole body as well as the 30 percent permanent partial general (work) disability.

The ALJ awarded claimant ttd benefits for a total period of 99.57 weeks. After a close review of the record, the Board finds this aspect of the Award should be modified. Claimant was off work beginning July 4, 1996 and although she was released to modified duty, respondent could not accommodate those restrictions. Thereafter, on December 3, 1996 claimant was released to return to work. Based on this evidence, the Board modifies the Award to reflect claimant's entitlement to temporary total disability benefits for the period July 4, 1996 to December 3, 1996.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated January 9, 2006, is affirmed in part and modified in part as follows:

The claimant is entitled to 21.86 weeks of temporary total disability compensation at the rate of \$205.08 per week or \$4,483.05 followed by 0.14 weeks of permanent partial disability compensation at the rate of \$205.08 per week or \$28.71 for a 14% functional disability followed by 122.30 weeks of permanent partial disability compensation at the rate of \$205.08 per week or \$25,081.28 for a 30% work disability, making a total award of \$29,593.04.

As of June 29, 2006 there would be due and owing to the claimant 21.86 weeks of temporary total disability compensation at the rate of \$205.08 per week in the sum of \$4,483.05 plus 122.44 weeks of permanent partial disability compensation at the rate of

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<sup>21</sup> *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

<sup>22</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

\$205.08 per week in the sum of \$25,110.00 for a total due and owing of \$29,593.04, which is ordered paid in one lump sum less amounts previously paid.

The balance of the Award is affirmed insofar as it is not inconsistent with the findings as set forth above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant  
Scott J. Mann, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director